

Mailing Date: February 22, 2011

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	Citation No. 09-0142
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT	:	
	:	License No. R-7600
v.	:	
	:	
TROPICAL CLUB & RESTAURANTE, INC.	:	LID 46971
t/a Tropical Club & Restaurante	:	
948-950 North 6 th Street	:	
Reading, PA 19601-1805	:	
	:	

Counsel for Licensee: Ex Parte (Hearing)
Rufo Rodriguez, Pro Se (Appeal)

Counsel for Bureau: Roy Harkavy, Esquire
Pennsylvania State Police,
Bureau of Liquor Control Enforcement
7448 Industrial Parkway
Macungie, PA 18602

OPINION

Tropical Club & Restaurante, Inc. t/a Tropical Club & Restaurante (“Licensee”) filed the instant appeal challenging the Second Supplemental Order of Administrative Law Judge David L. Shenkle (“ALJ”), wherein the ALJ

revoked Restaurant Liquor License No. R-7600 for failure to pay the fine imposed with regard to Citation No. 09-0142 (“the Citation”).

The Citation, issued on February 2, 2009, charged that on January 9, 2009, Licensee, by its servants, agents or employees, failed to keep records on the licensed premises, in violation of section 493(12) of the Liquor Code [47 P.S. § 4-493(12)].

Notice of the impending Citation was sent to Licensee by certified mail, return receipt requested, on January 14, 2009. The receipt was marked as unclaimed and returned to the Bureau on February 4, 2009. [N.T. 14-15; Ex. C-1]. The Citation was sent by certified mail, return receipt requested. [N.T. 15]. The notice was marked as unclaimed and returned to the sender on February 21, 2009. [N.T. 15; Ex. C-2].

A hearing was held regarding the Citation on August 25, 2009, at 11:30 a.m. Notice of the hearing was sent to Licensee by both first class mail and certified mail, return receipt requested and to Licensee’s attorney¹ by first class mail. [ALJ Adjudication]. The Notice sent to Licensee was marked as unclaimed and returned to the sender on July 29, 2009. [Admin. Notice].

¹ The Office of Administrative Law Judge received a notice of appearance from Licensee’s attorney, Daniel Becker, on February 26, 2009. On the same day, Mr. Becker and the Bureau’s attorney requested that the hearing originally scheduled for February 27, 2009, be continued. That request was granted. Mr. Becker withdrew his appearance on July 20, 2009. [Admin. Notice].

Although being duly notified of the time and place for the hearing, Licensee failed to appear. Roy Harkavy, Esquire, appeared at the hearing as counsel for the Bureau. Officer Ryan McFarland appeared and testified as a witness for the Bureau.

By Adjudication and Order mailed October 19, 2009, the ALJ sustained the charge set forth in the Citation and imposed a fine of fifty dollars (\$50.00). The ALJ also advised Licensee that failure to pay the fine within twenty (20) days of the mailing date of the Order would result in Licensee's license being suspended or revoked. The ALJ's Adjudication and Order were mailed to Licensee by first class mail and certified mail, return receipt requested. [Admin. Notice]. The receipt was signed and returned to the sender. [Admin. Notice].

Licensee failed to pay the fine within the allotted twenty (20) days. As a result, by Supplemental Order mailed December 11, 2009, the ALJ suspended Licensee's license for at least one (1) day and continuing thereafter until the fine was paid. The ALJ advised Licensee that he would review the matter again in sixty (60) days and, if necessary, impose further sanctions, which could include revocation of the license. The Supplemental Order was mailed to Licensee by first class mail and certified mail, return receipt requested. [Admin. Notice]. The receipt was signed and returned to the sender. [Admin. Notice].

The fine subsequently remained unpaid. Consequently, by Second Supplemental Order mailed March 5, 2010, the ALJ revoked Licensee's license effective April 19, 2010 at 7:00 a.m. The Second Supplemental Order was mailed to Licensee by first class mail and certified mail, return receipt requested. [Admin. Notice]. The receipt was signed and returned to the sender. [Admin. Notice].

On December 23, 2010, Licensee filed the instant appeal. Rufo Rodriguez, Licensee's shareholder and officer, asserts that his personal difficulties, including marital issues, contributed to Licensee's mismanagement. Mr. Rodriguez alleges that he was not aware of the issues at the licensed premises and had difficulty replacing problem employees. Mr. Rodriguez promises to pay the fines² and renewal fees, to require R.A.M.P. training for all employees, to complete a manager application, and to purchase a filing cabinet for Licensee's records and a frame for Licensee's license.

Section 471 of the Liquor Code establishes a thirty (30)-day filing deadline for appeals from an ALJ decision. [47 P.S. § 4-471]. The time for taking an appeal cannot be extended as a matter of grace or mere indulgence. West

² Licensee does not appear to be challenging the ALJ's decision to sustain the Citation and impose a fine of fifty dollars (\$50.00). Instead, Licensee only appears to be challenging the ALJ's decision to revoke its license for failing to pay the fine imposed with regard to the Citation.

Penn Power Co. v. Goddard, 460 Pa. 551, 333 A.2d 909 (1975); In re: Dixon's Estate, 443 Pa. 303, 279 A.2d 39 (1971). Furthermore, the extension of the time of filing an appeal should be limited to cases where “there is fraud [or] some breakdown in the court’s operation” caused by extraordinary circumstances. West Penn Power Co., 333 A.2d at 912. The negligence of an appellant, or an appellant’s counsel, or an agent of appellant’s counsel, has not been considered a sufficient excuse for the failure to file a timely appeal. Bass v. Commonwealth, 485 Pa. 256, 401 A.2d 1133 (1979).

The rule set forth in Bass was further clarified in Cook v. Unemployment Compensation Board of Review, 543 Pa. 381, 671 A.2d 1130 (Pa. 1996). Specifically, a delay in filing an appeal is only excusable if: (1) it was caused by extraordinary circumstances involving fraud or breakdown in the court’s operation or non-negligent conduct of the appellant, appellant’s attorney or his/her staff; (2) the appeal is filed within a short time after appellant or his counsel learns of and has the opportunity to address the untimeliness; (3) the time period which elapses is of very short duration; and (4) appellee is not prejudiced by the delay. Cook v. Unemployment Compensation Board of Review, 671 A.2d at 1131.

Here, Licensee does not assert that it never received the ALJ's Orders; nor does it assert that it received those Orders in an untimely manner. Moreover, although Mr. Rodriguez points to his personal difficulties as the reason for Licensee's mismanagement, he fails to explain how this attributed to the late filing of this appeal. Similarly, Licensee fails to explain why more than nine (9) months elapsed between the issuance of the ALJ's Second Supplemental Order revoking its license and the filing of the instant appeal. Therefore, Licensee has failed to satisfy the requirements for allowing an appeal *nunc pro tunc*.

Even assuming that Licensee had satisfied the requirements for allowing an appeal *nunc pro tunc*, Licensee's appeal challenging the ALJ's revocation of its license is without merit. Section 471 of the Liquor Code [47 Pa. Code § 4-471] authorizes the ALJ to revoke or suspend a license if a licensee does not pay the previously imposed fine within twenty (20) days of its imposition.

In this case, the ALJ's Adjudication and Order imposing the fifty dollar (\$50.00) fine with regard to the Citation clearly stated that the fine had to be paid within twenty (20) days of the mailing date of the Order, October 15, 2009. When Licensee failed to pay the fine, the ALJ, by Supplemental Order mailed December 11, 2009, suspended Licensee's license and warned that he would

reevaluate the situation sixty (60) days from the mailing date of the Supplemental Order and “impose further sanctions, which may include revocation of the license, if the fine remains unpaid at that time.” [Supplemental Order, December 11, 2009]. Despite the penalty of a suspension and the above-mentioned warning from the ALJ, Licensee still failed to pay the fine. As a result, by Second Supplemental Order mailed March 5, 2010, the ALJ revoked the license effective April 19, 2010. Significantly, in the Second Supplemental Order, the ALJ advised Licensee that he would reconsider his decision to revoke the license, if Licensee paid the fine in full prior to the effective date of the revocation. However, Licensee again failed to pay the fine. Thus, Licensee was given ample opportunity to pay the fine and avoid having its license revoked.

Given these circumstances, the Board concludes that the ALJ did not err or abuse his discretion in revoking Licensee’s license. Licensee’s willingness to pay the fine at this time is of no consequence in the present matter.

For the foregoing reasons, the instant appeal is denied as untimely, and the decision of the ALJ is affirmed.

ORDER

The decision of the ALJ is affirmed.

The appeal of Licensee is dismissed.

It is hereby ordered that Restaurant Liquor License No. R-7600 remains revoked. Licensee must adhere to all conditions set forth in the ALJ's Orders in this matter.

Board Secretary